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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 76-373

INTERSTATE COMMERCE COMMISSION

v.

CENTRAL OF GEORGIA RAILROAD COMPANY, ET AL.

On Appeal from the United States District Court for the District of Columbia

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MEMORANDUM FOR UNITED STATES CLAY PRODUCERS TRAFFIC ASSOCIATION, INC.

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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This is an appeal by the Interstate Commerce Commission and the United States from an order of a three-judge district court prohibiting the Commission from reopening the record and holding further hearings in a case * involving questions of first impression for that administrative agency. U. S. Clay Producers Traffic As-

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* Investigation & Suspension Docket No. 8544, *Clay, Points In Georgia To Savannah And Port Wentworth*, 349 ICC 377, J.S., App. J.

sociation, Inc., a party to the proceedings below, submits this Memorandum in support of the Commission's September, 1976 Jurisdictional Statement and urges the Court to find the questions presented by the appeal to be substantial.

The Commission order enjoined by the three-judge district court is an outgrowth of a recent appeal to this Court from a judgment of the same district court setting aside a decision on the merits by the Commission in the same administrative proceeding. In the prior appeal,* the judgment of the court below was affirmed without opinion on the motion of appellee railroads supported by a memorandum for the United States and the Commission.

The government's Memorandum in the prior case represented to this court that the appeal presented, "a narrow question of procedure that does not warrant plenary review," because, "if the Commission should wish in the future to adhere to its enlarged interpretation of the burden of proof requirement imposed by Section 15(7), in the context of a proposal to cancel a multiple-car rate, it will be able to do so in a hearing in which the carriers are put on notice regarding the scope of their burden of proof." (April, 1975 Memorandum for the Government in No. 74-989, p. 7.) The 'enlargement' to which the government's Memorandum referred was the statement in the Commission's decision that, "Having voluntarily established and maintained reduced rates for multicar shipments, carriers seeking cancellation *must also show* the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings inherent in multiple-car service" (emphasis supplied—J.S., App. J, p. 58A). According to the three-

* No. 74-989, *U. S. Clay Producers Traffic Ass'n., Inc. et al.* v. *Central of Georgia R. Co., et al.*, 421 U.S. 957, J.S., App. E.

judge district court, this additional or "enlarged" burden of proof was imposed by the Commission, "after the hearing was over and at the appellate level of the administrative proceeding". (J.S., App. F, p. 30A.) That court concluded, "We are not to be understood as saying that under no circumstances could considerations of this kind be relevant with respect to the termination of a multicar rate" (J.S., App. F, p. 36A).

Thereafter, on August 20, 1975, the Commission reopened the administrative proceeding to give the railroads "an opportunity to show the existence of circumstances or conditions by virtue of which they could not reasonably be expected to achieve cost savings normally inherent in multiple car service". Upon motion of the railroads, the same three-judge district court enjoined the Commission's order upon the ground that such a showing is, "inappropriate for a Section 15(7) case" despite the court's concession that there would be no impediment to a "new challenge" to the railroads' tariffs "in the form of a Section 15(1) proceeding" (J.S., App. A, p. 6A). It is this attempt to distinguish between the Commission's powers in a "Section 15(7) case" as compared to those it concededly possesses in "a Section 15(1) proceeding" which Clay Producers believes to be the essential, and substantial, error in the district court's present decision.

Section 15(7) Of The Interstate Commerce Act Confers No Lesser Authority Upon The Commission To Condemn Railroad Rates Than Does Section 15(1) Of The Act

The provisions of § 15(7) of the Interstate Commerce Act have been part of the law since the Mann-Elkins Act of 1910. Prior to that time the Commission had no power to suspend proposed rate changes. See *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, 662-664 (1963) for a discussion of the history of the section. In the first Commission decision following passage of the new provi-

sions of the act, the Commission was called upon to define its purpose. In *Advances in Rates—Western Case*, 20 ICC 307 (1911) the Commission, under the caption "Construction of New Law", discussed the legislative history, and then said:

> The question before the Commission is that which would have arisen had these rates gone into effect and a formal complaint been made against them as unjust and unreasonable. We may establish the rates proposed as reasonable, one or all of them, or reduce the proposed rates. For "the Commission may make such order in reference to such rate * * * as would be proper in a proceeding initiated after the rate had become effective." The purpose of Congress was to give this Commission the *same plenary power* over increased rates that since the enactment of the Hepburn Act it has enjoyed over other rates.
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> The assumption of the law is that the railroad which increases its rates takes such action knowing that the law casts upon it—if challenge is made either by this Commission or otherwise—the burden of justifying its action. Theirs, in the language of the learned Dean Wigmore, is "the risk of nonpersuasion". *Wigmore on Evidence*, SEC. 2485. The railroad must assume to prove to this Commission that the new and the increased rates are within the words of description and limitation used in the act; that is, that they are just and reasonable. And to say that they must satisfy our minds of this fact. (pp. 314 & 315-316, emphasis added)

Thirty-eight years later this Court, In *Ayrshire Collieries Corp.* v. *United States*, 335 U.S. 573 (1949), cited that Commission report in support of the following statement regarding the breadth of § 15(7):

> That section, which gives the Commission broad authority upon complaint or its own initiative to investigate and determine the lawfulness of any new rate, provides that "after full hearing, whether completed before or after the rate, . . . goes into effect the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective".
>
> The power of the Commission to deal with the situation as if the proposed new rate had become effective is necessarily a comprehensive one. It seems too plain for argument that such broad authority is ample for the modification of either proposed or existing rates or both. The power granted the Commission under § 15(1) to deal with rate schedules already effective supports that view.* (pp. 581-582)

More recently, the Commission, in *Sulfur, Canadian Origins to East St. Louis, Ill.*, 326 ICC 288 (1966) said:

> The standards of lawfulness are the same whether the proceeding involves a shipper complaint under § 1(5) of the act or an investigation instituted pursuant to § 15(7); the latter section, as here pertinent, *merely governs the burden of proof* with respect to proposed rates. (p. 298, emphasis added)

In light of these authorities, it is plain that the lower court has simply misconceived the interrelationship of §§ 5(7) and 15(1). The former is inclusive of the latter insofar as concerns the range of permitted inquiry and scope of the Commission's power to act. They differ only insofar as § 15(7) squarely imposes the burden of proof upon carrier proponents of a rate change, as to all of the issues cognizable under either section. In a sense very different from that which the lower court intended, it is quite true that the Commission "cannot . . . turn a Section 15(7) case into a Section 15(1) investigation". To

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* Because the language of § 15(7) quoted in the first excerpted paragraph of the Court's opinion gives the Commission the same ordering power as it has under § 15(1)—as the lower court expressly recognized in its own description of § 15(7). (J.S. App. F, pp. 21A, 22A)

do so would not, as the court supposes, enlarge the area of inquiry, but shift the burden of proof to the person challenging the rate change, rather than leaving it where Congress placed it, upon the carrier proponent of that change.

This Court has reversed the Commission for *refusing*, in a proceeding initiated under § 4, to consider and dispose of related issues arising under other sections, with different standards and objectives. In *Mechling Barge Lines* v. *United States*, 376 U.S. 375 (1964), the Court recited and rejected the Commission's defense:

> . . . the Commission does not believe that this policy requires it to consider and decide, in a fourth-section proceeding, every allegation of rate unlawfulness, no matter how remote. Continuing, the Commission argues that since the attack on the rates was on a proportional factor, the 6¢, and not on the through charge, these other claims of unlawfulness were beyond the immediate § 4 issues. We cannot agree that the mechanism of the rate under attack permits of such easy dismemberment.
>
> If the proceeding is splintered, contestants will be obliged to await the conclusion of § 4 proceedings before raising claims of violations under other sections of the Act. Not only would this be poor administration but it would result in manifest inequities and allow potential windfalls to some carriers. (pp. 382-383)

The language and rationale are, of course, far more cogent here, where the issues, which the lower court would insist *must* be splintered, differ only in terms of their relative traditionality vs. novelty. A shipper challenging the reasonableness of suspended rate changes would be confined to attempted rebuttal of whatever may be the "traditional factors" covered in the carriers' *prima facie* case. All other possible challenges, even though relevant to reasonableness, would be deferred to a § 15(1) proceeding to be initiated by the shipper, as a complainant, if and after the carrier is found to have met its burden of proof in the § 15(7) proceeding. Here this would mean beginning an entirely new Section 15(1) case after six years of litigation under Section 15(7). This just does not make any sense.

For these reasons, and those urged by the Commission in its Jurisdictional Statement, Clay Producers submit that the district court has fundamentally misconstrued Sections 15(7) and 15(1) of the Act thereby presenting substantial questions warranting either plenary review or summary reversal.

Respectfully submitted,

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September, 1976